IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH NAGPUR

Second Appeal No.637/2006

Office Notes, Memoranda of Coram appearances, Court's orders or directions and Registrar's orders.	:	Court's or Judge's orders

Coram : A.P.Lavande, J.
Dated : 20/3/2007

Heard Mr. Modak, learned counsel for the appellant and Mr. Gangane, Adv. holding for Advocate Khapre, learned counsel for legal representatives of respondent no.2.

By this appeal the appellant takes exception to the judgment and decree dated 14.8.2006 passed by 1st Adhoc Additional District Judge, Achalpur in Regular Civil Appeal No.33/1997 dismissing the appeal against the judgment and decree dated 7.1.1997 passed by Civil Judge, Jr. Dn. Achalpur in Regular Civil Suit No.331/1986.

The appellant is original plaintiff who filed the suit for declaration and injunction against the defendants-respondents claiming right of way by prescription through the property of the defendants.

In support of his case, the plaintiff examined PW 4 Sitaram Lokhande who had drawn the map after holding inspection of the field. He admitted that he did not find any drain on the suit way nor any canal. He also admitted that he had not shown canal in the map drawn by him. He also admitted that he had not shown the length of the disputed way in the map drawn by him. The Court Commissioner Mr. Shroti visited the spot and prepared report (Ex.30) and also filed map along with said report. The said report was not challenged by both the parties. The evidence of the Commissioner discloses that there exists a drain on the way claimed by the plaintiff. Relying upon the evidence of the Commissioner, the trial Court held that the plaintiff had not established that there was way as claimed by him and consequently held that the plaintiff had not established his right of way by prescription. This finding was confirmed by the lower Appellate Court in appeal preferred by the plaintiff.

Mr. Modak, learned counsel for the appellant submitted that the finding given by the trial Court and confirmed by the lower Appellate Court that the plaintiff has not established existence of way and that the plaintiff has not acquired any right of way by

prescription is a perverse finding given by the trial Court and confirmed by the lower Appellate Court warranting interference in second appeal. He, therefore, submitted that the decrees passed by both the Courts below deserve to be quashed and set aside.

Per contra, Mr. Gangane, learned counsel for the legal representatives of the respondent no.2 submitted that there are concurrent findings of fact which do not warrant interference in second appeal.

Having considered the submissions made by learned counsel and having perused the records, I do not find any merit in the present appeal. The finding given by the trial Court and confirmed by the lower appellate Court that the plaintiff has not established his right of way by prescription is a finding arrived at upon proper appreciation of the evidence led by the parties. There is no perversity in the finding given by the trial Court and confirmed by the lower Appellate Court. Therefore, the present second appeal has no merit. Consequently, the second appeal is dismissed.

JUDGE

A.